Filed 8/17/04 In re Patsy L. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re PATSY L. et al., Persons Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. JOHNNY J., Defendant and Appellant.	F045268 (Super. Ct. Nos. JD102801, JD102802, JD102803 **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Jon Stuebbe, Judge.

Barbara S. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

B.C. Barmann, Sr., County Counsel, and Mark L. Nations, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Harris, Acting P.J., Levy, J., and Gomes, J.

Johnny J. appeals from orders denying him reunification services on alternative grounds (Welf. & Inst. Code, § 361.5, subd. (b)(10) & (13) with his three children.[1] On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

In January 2004, respondent Kern County Department of Human Services (the department) placed appellant's three children, five-year-old Patsy, a two-year-old son, and an infant daughter, into protective custody following a referral to the family home for general neglect. The department and law enforcement discovered the home lacked electricity and was roach-infested. In addition, the parents who admitted snorting methamphetamine the night before were under the influence of the drug. Both appellant and the children's mother who had been registered narcotics offenders for several years, had been using methamphetamine daily for at least the preceding two months.

This was not the first time appellant's neglectful parenting had attracted the department's attention. Three years earlier, appellant's as well as the mother's neglect and drug-abuse led to Patsy being adjudged a dependent child and removed from parental custody. The court in May 2001 ordered family reunification services for each parent, including drug abuse counseling and random drug testing. The mother completed her case plan so that the court eventually returned Patsy to her custody and terminated its jurisdiction. Appellant, on the other hand, did not comply with the reunification plan such that the court terminated services for him in late 2001. Although appellant had been incarcerated during the reunification period, a social worker sent letters to appellant detailing the court-ordered case plan and tried to assist appellant with accessing services in prison. Notably, substance abuse counseling was available to him at the prison in

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

which he was housed. However, appellant never submitted any documentation that he pursued the court-ordered treatment.

In February 2004, the department prepared separate social studies for the court in the present case. One social study addressed issues related to jurisdiction while the other focused on dispositional issues. At a February 24, 2004, hearing, both parents submitted on the jurisdictional social study, which resulted in the court exercising its dependency jurisdiction under section 300, subdivision (b) (neglect) as to all three children and under section 300, subdivision (j) (abuse/neglect of sibling) as to the two younger children. This later jurisdictional finding was based on the 2001 dependency adjudication of Patsy and the termination of services for appellant.

At the same February hearing, appellant requested a contested hearing on disposition. In its dispositional social study, the department recommended the court deny appellant reunification services. It cited section 361.5, subdivision (b)(10) and relied on appellant's previous failure to reunify with Patsy and the lack of evidence that he made any attempt to address his substance abuse.[2]

The court in turn set the case for a March 23, 2004, contested dispositional hearing. Five days before the contested hearing, the department served the court and counsel with a "Social Study – Supplemental." In relevant part, the department reported

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[2] Section 361.5, subdivision (b)(10) provides that a court need not provide reunification services to a parent when the court finds, by clear and convincing evidence

> "[t]hat the court ordered termination of reunification services for any siblings of the child because the parent or guardian failed to reunify with the sibling after the sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling of that child from that parent or guardian."

that while it still recommended the court deny appellant reunification services under section 361.5, subdivision (b)(10), it also recommended the court deny him services under subdivision (b)(13) of section 361.5.[3] The department repeated the information it had previously reported, namely that: the court in May 2001 ordered appellant to participate in family reunification services, including substance abuse counseling and random drug testing; appellant did not participate in his case plan; and later that year, the court terminated services for appellant.

At the March dispositional hearing, the department submitted the matter on its original and supplemental social studies. Counsel for appellant objected on notice grounds to the department's new recommendation against services for appellant under section 361.5, subdivision (b)(13). Arguing appellant did not receive timely notice of the new recommendation, counsel told the court "No facts changed on this, Your Honor. They were well aware of the facts when they filed the petition."

Counsel for the department replied that because, as appellant's attorney had acknowledged, the facts had not changed and those facts were known to all the parties from the inception of the case, there was nothing to prohibit the department from making the new recommendation. County counsel also objected to any continuance. Counsel for the minors joined the department. Appellant's attorney retorted that she was not requesting a continuance, but rather only arguing the court should not allow the department to pursue a denial of services under section 361.5, subdivision (b)(13).

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[3] In relevant part to this appeal, section 361.5, subdivision (b)(13) also authorizes the denial of reunification services for a parent when the court finds by clear and convincing evidence:

> "[t]hat the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention . . . ."

Citing the point that the facts had not changed, the court denied the request by appellant's counsel. Appellant's counsel then called the social worker who prepared the original and supplemental social studies to the stand and cross-examined her. The social worker reiterated that substance abuse treatment was available to appellant in 2001 where he was imprisoned but he did not participate. Appellant's counsel also made an offer of proof, accepted by the parties and the court, that if called to the stand, appellant would testify no counseling services were available to him at either the prison reception center or at the prison at which he was later housed.

Following argument, the court adjudged all three children dependents and removed them from parental custody. The court then ordered services for the mother. It, however, denied the father services as to all three children under section 361.5, subdivision (b)(13) and as to the two younger children under section 361.5, subdivision (b)(10).

DISCUSSION

Appellant challenges the denial of reunification services for him both under subdivisions (b) (10) and (b)(13) of section 361.5. As to the section 361.5, subdivision (b)(13) finding, appellant renews his trial court argument that he did not receive adequate notice of the department's decision to seek a denial on this ground such that he was denied due process. Appellant also urges that the court could not properly find he resisted prior court-ordered treatment for his substance abuse.

Because the court denied appellant reunification services as to all three children under section 361.5, subdivision (b)(13), we have reviewed appellant's challenge to that denial first. Having concluded, as discussed below, that the court properly denied

appellant services under subdivision (b)(13), we see no need to and therefore will not further consider appellant's attacks on the section 361.5, subdivision (b)(10) finding.[4]

No Due Process Violation

We are not persuaded by appellant's due process argument. His underlying premise that he was denied timely notice is faulty and any suggestion that the added recommendation against services somehow caught him by surprise is disingenuous.

Although appellant claims he was entitled to 10-days statutory notice of the department's new recommendation prior to the dispositional hearing, he fails to cite and our research of the notice statutes (§§ 290.1 et seq.) does not reveal any authority for his claim.[5] We acknowledge that, regardless of the presence or absence of a statutory notice requirement, a party might still claim a due process denial if there was no notice reasonably calculated under the circumstances to apprise interested parties of the pending action and afford them an opportunity to be heard (*In re John B.* (2000) 84 Cal.App.4th 100,). However, there was no due process violation here. Appellant already had notice that the department would be recommending no services for him. He was also aware of the factual basis for the department's recommendation under section 361.5, subdivision (b)(10). It was in relevant part that he did not participate in court-ordered reunification services, most notably drug abuse counseling and random drug testing, in 2001 when Patsy was first adjudged a dependent child and the court consequently terminated services for him. Coincidentally, that factual basis also supported a denial of services

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4 As to the section 361.5, subdivision (b)(10) finding, appellant contends: (1) he was reunited with Patsy after his prison release in 2002, and (2) Patsy was not in a permanent plan such that the court could not properly find section 361.5, subdivision (b)(10) applicable. Alternatively he claims because the court awarded the mother reunification services, it was arguably within the children's best interests that he also receive services.

5 Appellant cites section 361.21 which relates to out-of-state group home placements and quotes language from section 366.21 which relates to status review hearings, hearings which occur **after** a dispositional hearing.

under section 361.5, subdivision (b)(13). In essence, appellant's argument to the trial court, as well as on review, is little more than gamesmanship, particularly in light of the fact that he expressly did not want a continuance.

On The Merits

Appellant does not deny he has a history of extensive, abusive, and chronic use of drugs. He acknowledges that the dependency court in 2001 ordered him to participate in drug abuse counseling and random drug testing as part of his reunification plan during Patsy's first dependency. Furthermore, he admits he never participated in the court-ordered drug abuse counseling and random drug testing. Nevertheless, he complains the court could not properly find he resisted prior court-ordered treatment for his substance abuse and therefore it erred in denying him services under section 361.5, subdivision (b)(13) (see fn. 3, *supra*). According to appellant, the issue boils down to enrollment. Appellant did not resist because there is no evidence he ever enrolled in any drug treatment program.

Appellant's argument borders on the ridiculous. His failure to participate in drug abuse counseling despite the court's 2001 order is a quintessential example of resistance. As the court in *Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006, 1010 observed:

> "The common definition of 'resist' is either 'to withstand the force or effect of' or 'to exert oneself to counteract or defeat.' (Webster's New Internat. Dict. (3d ed. 1981) p. 1932.) The definition encompasses both active and passive behavior. Thus, a parent can actively resist treatment for drug or alcohol abuse by refusing to attend a program or by declining to participate once there. The parent also can passively resist by participating in treatment but nonetheless continuing to abuse drugs or alcohol . . . . In either case, a parent has demonstrated a resistance to eliminating the chronic use of drugs or alcohol which led to the need for juvenile court intervention to protect the parent's child."

To the extent appellant relies on *In re Brian M.* (2000) 82 Cal.App.4th 1398, we conclude his reliance is misplaced. The mother in *Brian M.* had been previously ordered to complete a drug rehabilitation program as a condition of probation in a criminal case

and she never attended the program. A dependency court appeared to rely on this showing to find that the mother resisted prior treatment.[6] The appellate court affirmed, deeming the probation condition order as the functional equivalent of enrollment. (*In re Brian M., supra,* 82 Cal.App.4th at pp. 1401-1402.) Factually speaking, appellant's resistance here was virtually indistinguishable from that of the mother in *Brian M., supra*.

Due to some suggestion that the juvenile court denied the mother services because she had a long-standing drug habit and never *sought* treatment, the appellate court proceeded to interpret "resisted prior treatment" to mean "an individual must be shown to have started a program or refused one *at some time.*" (*In re Brian M., supra,* 82 Cal.App.4th at p. 1403, original emphasis.) It is this portion of *Brian M., supra,* upon which appellant relies in making his "enrollment" argument.

In light of the 2002 statutory amendment to require that the parent "resisted prior court-ordered treatment," we question the ongoing precedential value of *Brian M., supra,*. In any event, we believe appellant's failure to participate in court-ordered drug treatment in 2001 would qualify as a refusal and thus resistance, even according to the *Brian M., supra,* court.

DISPOSITION

The orders denying appellant reunification services are affirmed.

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6 At the time of those proceedings, the statute, then enumerated as section 361.5, subdivision (b)(12), required, in relevant part, a finding that a parent with the requisite history of drug abuse "resisted prior treatment." In 2003, the Legislature amended subdivision (b)(13) of section 361.5 to require that the parent "resisted prior court-ordered treatment." (Stats. 2002, c. 918 (AB 1694), § 7.)